TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 125.

HENRIETTA S. GOULD, EXECUTRIX OF CHARLES GOULD, DECEASED, PLAINTIFF IN ERROR,

vs.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED DECEMBER 13, 1873.

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1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and seventy-three, before the honorable Walter Q. Gresham, judge of the district court of the United States for the district of Indiana, and ex officio judge of said circuit court.

HENRIETTA S. GOULD, EXECUTRIX, &c., OF Charles Gould, deceased, *v.* THE EVANSVILLE AND CRAWFORDSVILLE RAILroad Company. } 1670. Assumpsit.

Be it remembered that, heretofore, to wit, on the day of , 1869, the plaintiff, by C. W. Allen and John B. Niles, his attorneys, filed in the office of the clerk of said court his declaration in the above entitled cause, in the words and figures following, to wit:

And afterwards, to wit, at the May term of said court, on the 8th day of June, A. D. 1869, before the honorable David McDonald, one of the judges of said court, the following further proceedings in the above
2 entitled cause were had, to wit:

Now comes the defendant, by Mr. Iglehart, its attorney, and files its separate demurrers to the first and second counts of the plaintiff's declaration, in the words following:

And the plaintiff joins in demurrer.

And afterwards, to wit, at the May term of said court, on the 28th day of June, A. D. 1869, before the honorable David McDonald, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and by their agreement the cause is submitted upon demurrer. And thereupon the cause is continued under advisement until the next term of this court. And leave is granted to both parties to file arguments within ninety days from this date.

And afterwards, to wit, at the November term of said court, on the 3d day of November, A. D. 1869, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Comes now the defendant, by counsel, and, by leave of the court,
3 withdraws the demurrer and joinder heretofore filed, and now files his separate pleas to the first, second, and third counts of the declaration.

And upon his motion the plaintiff is ruled to reply on or before Friday next.

And afterwards, to wit, at the November term of said court, on the 25th day of November, A. D. 1869, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the plaintiff now files his demurrer to the first, second, and third pleas of the defendant, in the words following, to wit:

And the defendant now files his joinder in demurrer.

And afterwards, to wit, at the November term of said court, on the

26th day of November, A. D. 1869, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Now come the parties, and, by leave of the court, the plaintiff withdraws without prejudice the first and second counts of said declaration, and the defendant withdraws the pleas thereto, and the former
4 third count is so modified as to constitute the declaration in the case. And the plea and demurrer thereto stand as heretofore.

And afterwards, to wit, at the November term of said court, on the 4th day of December, A. D. 1869, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the court being sufficiently advised, doth now overrule the demurrer to the pleas of the defendant herein.

And afterwards, to wit, at the May term of said court, on the 18th day of May, 1870, before the honorable David Davis and the honorable Thomas Drummond, judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the court being sufficiently advised on the issue raised by the demurrer herein, takes the demurrer back to the declaration and sustains said demurrer to the declaration. And the plaintiff, on motion, has leave to amend his said declaration.

And afterwards, to wit, at the May term of said court, on the
5 20th day of May, 1870, before the honorable David Davis, one of the judges of said court, the following further proceedings in the above entitled cause were had, to wit:

Comes now the plaintiff, by Mess. Porter, Harrison & Fishback, his attorneys, and files his amended declaration herein, in the words and figures following, to wit:

In the United States circuit court, district of Indiana.

Charles Gould, a citizen of the State of New York, plaintiff in this suit, complains of the Evansville & Crawfordsville Railroad Company, a corporation existing in and duly established under the laws of the State of Indiana, of a plea, that the defendant render to the plaintiff the sum of ten thousand dollars, which it owes to, and unjustly detains from, the plaintiff.

For that whereas heretofore, to wit, on the third day of August, 1860, by the judgment and consideration of the supreme court of the State of New York, the said plaintiff recovered against the said Evansville and Crawfordsville Railroad Company, by the name of the Evansville & Crawfordsville Railroad Company, the further sum of three thousand seven hundred and eighty-seven dollars and six cents for his debt,
6 damages and costs in a certain suit therein pending, as hereinafter mentioned, the said court then and there having jurisdiction of said parties and of the subject-matter of said action, as by the record and proceedings thereof still remaining in said supreme court of said State of New York more fully appears, and which said judgment still remains in full force and effect not in anywise vacated, reversed, or satisfied, and upon which the said plaintiff hath not obtained any execution.

And the plaintiff avers that, heretofore, to wit, on the second day of

January, 1849, an act of the general assembly of the State of Indiana was passed, and approved by the governor of said State, entitled "An act to incorporate a company to construct a railroad from Evansville, on the Ohio River, to connect with the Ohio and Mississippi Railroad at Olney, in the State of Illinois, via Princton, in Gibson County, and Mount Carmel, Illinois." And the plaintiff avers that said act created a corporation under the name of the Evansville and Illinois Railroad Company, with power to construct, own, and operate a railroad from said Evansville to said town of Princeton, in said State, and to the west line of the State, as therein mentioned.

7 The plaintiff further avers that, afterwards, to wit, on the twenty-first day of January, eighteen hundred and fifty, a subsequent act of said general assembly was passed, and approved by the governor of said State, entitled "An act to amend the charter of the Evansville and Illinois Railroad Company," by which said company was authorized to construct and maintain its said railroad from said town of Princeton to Vincennes, in Knox County, in said State.

The plaintiff further avers that presently thereafter said company was duly organized, and before the commencement of said action in the supreme court of the State of New York, as hereinafter mentioned, and before the change of the name of said company to that of the Evansville and Crawfordsville Railroad Company, as hereinafter mentioned, the said Evansville and Illinois Railroad Company had acquired property in said State of great value, to wit, of the value of three hundred thousand dollars, and more than sufficient to pay the said judgment so rendered in favor of said plaintiff, and had acquired its right of way, and had actually constructed more than twenty miles in length of its said line of railroad.

8 And the plaintiff further avers that, on the sixth day of February, eighteen hundred and fifty-one, an act of said general assembly was passed, and approved by the governor, entitled "An act to incorporate the Wabash Railroad Company," by which last-mentioned act said last-mentioned company was authorized to construct and maintain a railroad from said town of Vincennes north through the counties of Sullivan and Vigo to Terre Haute, and at the pleasure of the company north to Crawfordsville. And by the 27th section of said act it was provided and enacted, that it should be lawful for the company thereby created, and the said Evansville and Illinois Railroad Company, to consolidate their said charters, and to become one company under the said several acts of incorporation of said companies, and that said company should have all the rights, privileges, and extensions granted in the corporation charters of said two companies, and the amendments thereto, and also that it should be lawful for said consolidated company to assume such name as the directors thereof should direct.

9 The plaintiff further avers that, on the 26th day of April, 1851, and before the time of the consolidation and change of name of the said Evansville and Illinois Railroad Company, as hereinafter mentioned, the said plaintiff impleaded the said company in the said action in the said supreme court of the State of New York, and the said company, by its agents and attorneys, appeared thereto and submitted to the jurisdiction of said court therein.

And the plaintiff further avers that, after such impleading of said company in said court by said plaintiff, and while the matters in controversy in said action were being litigated in said court between said

parties in said action, to wit, on the 18th day of November, 1852, the said Evansville and Illinois Railroad Company and the said Wabash Railroad Company, did, by virtue of the said 27th section of said act to incorporate said last-named company, consolidate their said charters and unite into one company, under the said name and style of the Evansville and Illinois Railroad Company; and the said consolidated company, under its said name, did continue to appear to and defend said action in said supreme court.

And the plaintiff avers that, afterwards, to wit, on the 4th day of March, 1853, and long after the consolidation and the assumption by said consolidated company of the name of the said Evansville
10 and Illinois Railroad Company, and after said consolidated company had so continued to appear to said action under said name, an act was passed by said general assembly entitled "An act to amend the charter of the Evansville and Illinois Railroad Company," by which act it was provided and enacted as follows:

"Whereas it has been represented to this general assembly that, pursuant to the provisions of section 27 of the act to incorporate the Wabash Railroad Company, approved February 6, 1851, the several companies organized under the act to incorporate the Evansville and Illinois Railroad Company have consolidated their charters, and have become one company, subject to the liabilities and privileges of the said several charters, and in and by their act of consolidation have adopted the name of the Evansville and Illinois Railroad Company as their corporate name:

"Therefore be it enacted by the general assembly of the State of Indiana, sec. 2, that the corporate name and style of said company, as adopted in the said act consolidating the said several companies, is hereby changed, and henceforth the said company shall be called and known by the name of the Evansville and Crawfordsville Railroad
11 Company, and by this name and style shall sue and be sued, plead and be impleaded, and do all acts and things, and in and by that name the said company shall be held liable for all contracts and engagements and for all acts made or done by the said several companies before the said act consolidating the same, and before this act shall come to be in force; and all moneys, property, rights, credits, privileges, and interest acquired or possessed by said consolidated, before their consolidation, or afterwards, and before the publication and acceptance of this act, shall belong to and be possessed by said consolidated company in and by the name and style of the Evansville and Crawfordsville Railroad Company in the same manner and to the same extent, to all intents and purposes, as the same did belong to and was possessed by the said several companies respectively, and as if the name adopted on consolidation has not been hereby changed" * * * * Sec. H. "An emergency existing by reason of the fact, that the said railroad is now in course of prosecution, this act shall be in force from and after its publication and acceptance by the directors of said company."

And the plaintiff avers that the said last-mentioned act was,
12 presently after its passage, to wit, on the day of A. D. 1853, duly and fully accepted by the directors of said company, and the same was then and there duly published, and thereby the name of said company became, and ever since has been, the Evansville and Crawfordsville Railroad Company, and the said consolidated company, by said new name, became and was liable for all the acts made or done by said several companies, and each of them. And plaintiff, for greater certainty, refers to said entire act.

And the plaintiff further avers that, after such change of the name of said defendant, it continued to appear to and defend said action in the said supreme court of the State of New York, under the said name of the Evansville and Illinois Railroad Company, and so continued to defend the same until final judgment was rendered thereon, as aforesaid, against said defendants to this action by the said name of the Evansville and Illinois Railroad Company.

The plaintiff further avers that the said Wabash Railroad Company never owned or possessed any property whatever, and that the only operation and effect of the said consolidation was to enlarge the
13 powers of the said Evansville and Illinois Railroad Company.

And the plaintiff further avers that, when the said judgment was so rendered in said supreme court of the State of New York and thence hitherto, a statute law of said State was enacted and in force in the words following, to wit:

"The rate of interest upon the loan or foreclosure of any money, goods, or things in action shall continue to be seven dollars upon one hundred dollars for one year, and after that rates for a greater or less sum and for a longer or shorter time."

Wherefore the plaintiff says that an action has accrued to him, to demand and have of and from the said defendant, the Evansville and Crawfordsville Railroad Company, the said sum of three thousand seven hundred and eighty-seven dollars and six cents, together with interest thereon at the rate of seven per cent. per annum from the said third day of August, 1860, parcel of the sum above demanded. Hence this action.

C. M. ALLEN & JNO. B. NILES,
Attys. for Plff.

It is hereby stipulated between the parties to the above action,
14 that the above third count and a demurrer thereto may be now filed, and that the demurrer shall be submitted to the court on written argument, the same as the demurrers to the other counts.

June , 1869.

JNO. B. NILES, *Atty. for Plff.*
——— ——— ———, *Atty. for Deft.*

And afterwards, to wit, at the May term of said court, on the 24th day of May, 1870, before the honorable David Davis, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and the defendant files its pleas to the declaration herein as amended, in the words and figures following, to wit:

And said defendant, by Asa Iglehart, her attorney, comes, and for plea in this behalf says, that as to said third count of said declaration actio non, because she says that heretofore, to wit, on the day of , 1865, said plaintiff filed his complaint in the Knox circuit court of the State of Indiana against said defendant, which was and is in the following words and figures, to wit:

In the Knox circuit court. August term, 1865.

CHARLES GOULD
v.
THE EVANSVILLE AND CRAWFORDSVILLE Railroad Company.

15 Charles Gould, plaintiff, complains of the Evansville and Craw-

fordsville Railroad Company, a corporation created by the laws of the State of Indiana, defendant, and says that heretofore, to wit, on the 26th day of April, 1851, he instituted his action in the supreme court of the State of New York, in and for the first judicial district of said court for said State, against the Evansville and Illinois Railroad Company, a corporation created by the laws of the State of Indiana, which said Evansville and Illinois Railroad Company appeared by attorney, and such proceedings were had therein that afterwards, to wit, on the 3d day of August, 1860, at a term of said court then and there held, at the county of New York, and State of New York, the said cause was then and there by said court heard and determined, and the plaintiff herein, by the judgment and consideration of the court aforesaid, recovered judgment against the Evansville and Illinois Railroad aforesaid for the sum of three thousand two hundred and eighty-seven dollars and eighty-eight cents, together with his costs of suit, amounting to the further sum of four hundred and ninety-nine $\frac{10}{100}$ dollars, a copy of which judgment and proceedings in said cause is filed
16 herewith, marked "A," and made part hereof, and the plaintiff says that the court trying said cause and rendering said judgment was a court competent to try and determine the matter in controversy, and have tried and determined in said suit and jurisdiction of the person of the defendant and the subject-matter, which said judgment remains in full force unreversed and not paid.

And the plaintiff further avers that heretofore, to wit, on the 18th day of November, 1852, the said Evansville and Illinois Railroad Company, under and by virtue of the 27th section of an act of the general assembly of the State of Indiana, approved the 6th day of February, 1851, and entitled "An act to incorporate the Wabash Railroad Company," did consolidate her, the defendant's, organization and charter with the organization and charter of the said Wabash Railroad Company, the said Wabash Railroad Company then and there being a corporation created by the laws of the State of Indiana, and the said Evansville and Illinois Railroad Company and the said Wabash Railroad Company then and there and thereby became one company, and by said consolida-
17 tion and took the corporate name of the Evansville and Crawfordsville Railroad Company, took possession of all the rights, credits, effects, and property of the Evansville and Illinois Railroad Company, and of the Wabash Railroad Company, and used and converted the same to her own use in said corporate name, and then and there and thereby became and was liable to pay all the debts and liabilities of the said Evansville and Illinois Railroad Company, of which the claim of the plaintiff was one.

And the plaintiff further avers that after said consolidation, and from thence henceforth to the rendition of the judgment on which his suit is brought, the said defendant, by her attorney, directed and managed the defense in said suit, wherein this judgment was rendered. And the plaintiff says that afterwards, to wit, under and by virtue of an act of the general assembly of the State of Indiana, approved the 4th day of February, 1853, the said consolidation of the Evansville and Illinois Railroad Company and the Wabash Railroad Company was approved, together with the change of the corporate name of the said defendant.

And plaintiff avers that, by virtue of the premises, the judgment
18 so as aforesaid rendered, the said defendant became and is liable to pay the said judgment, and all interest and costs therein, but the same remains wholly unpaid.

Wherefore the plaintiff demands judgment for ten thousand dollars,

and other proper relief; and plaintiff files herewith copies of the act incorporating the Evansville and Illinois Railroad Company, with the several acts amendatory thereof, approved Jan. 21, 1850, Feb. 13, 1851, and the act to incorporate the Wabash Railroad Company, approved Feb. 6, 1851, and also an act entitled "An act to amend the charter of the Evansville and Illinois Railroad Company," approved March 4, 1853.

C. M. ALLEN,
Plff's Atty.

And said defendant avers that a copy of the judgment and proceedings mentioned in said complaint, as also copies of all said acts of the legislature therein referred to, were duly filed with said complaint as exhibits thereto; that thereupon a summons was duly issued by the clerk of said court, and was duly served by the sheriff upon said defendant;
who, at the August term, 1865, of said court, by her attorney, ap-
19 peared to said action and filed her demurrer to said complaint in the words and figures following, to wit:

Knox circuit court, August term, 1865.

CHARLES GOULD
v.
THE EVANSVILLE AND CRAWFORDSVILLE RAILroad Company.

The defendant demurs to the complaint, because said complaint does not state facts sufficient to constitute a cause of action against defendant.

And thereupon, afterwards, to wit, at the same term of said court, said court upon said demurrer rendered judgment, in the words and figures following, to wit:

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And the court, being fully and sufficiently advised on the demurrer, sustains the demurrer, and grant the plaintiff leave to amend the complaint, and the plaintiff, to this opinion and judgment of the court, objects and excepts, and declines to amend the complaint.

It therefore, on motion, considered and adjudged that the plaintiff take nothing by his suit in this behalf, and that the plaintiff pay the
costs and charges herein; and thereupon the plaintiff prays
20 an appeal, which is granted, to the supreme court upon his filing bond in the sum of two hundred dollars, within thirty days, with Cyrus M. Allen surety.

And the defendant says that said matters and things set forth and complained of in said complaint are the same matters and things set forth and complained of in said third count of said declaration.

Therefore, the defendant says that the plaintiff impleaded the defendant in a court of competent jurisdiction upon the same cause of action, disclosing the same ground and alleging the same facts to sustain the same as are described and alleged in said third count; and that said

court having jurisdiction of the parties and of the subject-matter, rendered final judgment upon the merits in favor of said defendant and against said plaintiff, which judgment remains unreversed and in full force; and this defendant is ready to verify.

ASA IGLEHART,
Attorney for the Defendant.

And the plaintiff files his demurrer to said pleas, in the words and figures following, to wit:

21 And the said plaintiff as to said pleas of said defendant by him above pleaded to said first count in said declaration, saith that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining the aforesaid action against the said defendant; and that he, the said plaintiff, is not bound by law to answer the same; and this the said plaintiff is ready to verify.

Wherefore, by reason of the insufficiencies of the said plea in this behalf the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on account of the detention thereof, to be adjudged to him, &c.

2d. And the said plaintiff as to said pleas of said defendant by him above pleaded to said second count in said declaration, saith that the same and the matters therein contained, as above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having and maintaining his said action against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same;

22 and this the said plaintiff is ready to verify.

Wherefore, by reason of the insufficiency of the said pleas in this behalf the said plaintiff prays judgment and for his debt aforesaid, together with his damages by him sustained on account of the detention thereof, to be adjudged to him, &c.

3d. And the said plaintiff as to said plea of said defendant by him above pleaded to said third count in said declaration, saith that the same and the matters therein contained in manner and form, as the same are above pleaded and set forth, are not *not* sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his said action against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same; and this the said plaintiff is ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him, &c.

J. B. NILES &
PORTER, HARRISON & FISHBACK,
Att'ys for Pl'ff.

23 And the defendant says that said pleas are sufficient in law. Wherefore it prays judgment.

And this cause is continued.

And afterwards, to wit, at the May term of said court, on the 9th day of May, 1871, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now Porter, Harrison, and Hines, attorneys for the plaintiff and give the court to understand and be informed that, since the last continuance of this cause, the plaintiff, Charles Gould, has departed this life, and that Henrietta S. Gould is named the executrix in the last will and testament of said deceased and has been duly appointed and qualified as such.

And upon motion it is ordered, that this cause be revived in the name of said Henrietta S. Gould, executrix, as aforesaid.

And afterwards, to wit, at the November term of said court, on the 1st day of December, 1871, before the honorable Thomas Drummond, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

24 Come now the parties, by their respective attorneys, and file their agreement in writing, in the words and figures following, to wit:

It is agreed that the demurrer to the plea in this cause may be submitted to Judge Drummond upon brief, and that, if his honor shall be of the opinion that said demurrer ought to be overruled, the order overruling the same may be entered at once; but if his honor shall be of opinion that said demurrer should be sustained, then the order sustaining the same shall only be entered upon the concurrence of Hon. W. Q. Gresham, judge of the district court, before whom said demurrer was once before argued, and who intimated an opinion upon the same, and, if said judges shall differ in opinion upon consultation, they may certify such division according to law.

J. B. NILES AND
PORTER, HARRISON & HINES,
For Pl'ff.
ASA IGLEHART, *Att'y for Defendant.*

And afterwards, to wit, at the November term of said court, on the 29th day of November, 1872, before the honorable Thomas Drummond and the honorable Walter Q. Gresham, judges of said court, the

25 following further proceedings in the above-entitled cause were had, to wit:

The demurrer to the plea in bar of this suit, because of the judgment between the same parties, rendered in the circuit court of Knox County, of this State, having been heretofore submitted to the circuit and district judges, and they being now sufficiently advised, overrule the said demurrer, and hold the said pleas sufficient in law.

And afterwards, to wit, at the November term of said court, on the 18th day of December, 1872, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings were had in the above-entitled cause, to wit:

Comes now the defendant, by counsel, and upon its motion it is ordered that the plaintiff amend his declaration by Saturday morning next.

And afterwards, to wit, at the May term of said court, on the 9th day of May, 1873, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Mr. Niles and Mess. Porter, Harrison and Hines, his attorneys, and files his reply herein, in the words and figures following, to wit:

26 And for reply to said answer of said defendant, the plaintiff says, that the said alleged decision of said Knox circuit court, of the State of Indiana, was not a decision and judgment on the merits of this case, but, on the contrary thereof, the judge of said Knox circuit court, in deciding as to the merits of the said complaint in that case on the demurrer thereto, merely and only decided this one point or question: that said complaint did not state facts sufficient to sustain said action, in this, that, according to the allegations of said complaint, the original Evansville & Illinois Railroad Company, on the taking place of the said alleged consolidation, as alleged in the said complaint, ceased to exist as a separate corporation, and that said complaint did not state any matters of fact showing a revivor of said suit against said consolidated company, or any facts which rendered such ~~revision~~ revivor unnecessary.

And the plaintiff avers that the following allegations contained in the complaint in this case, and which were not contained in the said complaint in the Knox circuit court, fully supply all the facts, for the want of which said demurrer was so sustained by the judge of
27 said Knox circuit court, and in the defence of which he held that said suit had abated by said consolidation trust.

And the plaintiff further avers that, after such impleading of said company in said court by said plaintiff, and while the matters in controversy in said action were being litigated in said court between said parties in said action, to wit, on the 18th day of November, 1852, the said Evansville & Illinois Railroad Company, and the said Wabash Railroad Company did, by virtue of the 27th section of said act to incorporate said last-named company, consolidated their said charters and united into one company under the said name and style of the Evansville and Illinois Railroad Company, and the said consolidated company, under its said name, did continue to appear to and defend said action in said supreme court.

And the plaintiff avers that, afterwards, to wit, on the 4th day of March, 1853, and long after the consolidation and the assumption by said consolidated company of the said name of the Evansville and Illinois Railroad Company, and after said consolidated company had so continued to appear to said action under said name, an act was
28 passed by said general assembly entitled:

"An act to amend the charter of the Evansville & Illinois Railroad Company," by which act it was provided and enacted as follows:

"Whereas it has been represented to this general assembly, that, pursuant to the provisions of section 27 of the act to incorporate the Wabash Railroad Company, approved February 6th, 1851, the several companies organized under the act to incorporate the Evansville & Illinois Railroad Company have consolidated their charters and have become one company, subject to the liabilities and privileges of the said several charters, and in and by their act of consolidation have adopted the name of the Evansville & Illinois Railroad Company as their corporate name:

"Therefore, be it enacted by the general assembly of the State of Indiana, sec. 2, that the corporate name and style of said company as adopted in the said act *of* consolidating the said several companies is changed, and henceforth the said company shall be called and known by the name of the Evansville & Crawfordsville Railroad Company."

And the said plaintiff for greater certainty refers to said entire
29 act and avers, that it was only subsequent to, and wholly by vir-

tue of said act, that the name of said consolidated company was changed to said name of the Evansville and Crawfordsville Railroad Company, by which name the said defendant ever since has been and now is known and called.

And the said plaintiff avers that said last-mentioned act was, presently after its passage, to wit, on the day of , A. D. 1853, duly and fully accepted by the directors of said company, and the same was duly published, and thereby the name of said company became and ever since has been the Evansville and Crawfordsville Railroad Company, and the said consolidated company by said new name became and was liable for all acts made or done by said companies and each of them; and the plaintiff for greater certainty refers to said act.

And the plaintiff further avers that, after such change of name, it continued to appear and defend said action in the said supreme court of the State of New York, under the said name of the Evansville & Illinois Railroad Company, and so continued to defend the same until
30 final judgment was rendered therein as aforesaid, against said defendant to this action by the said name of Evansville & Illinois Railroad Company. The plaintiff now refers to said complaint in this case and to the allegations of the complaint in said Knox circuit court.

And the plaintiff avers, that it did not in any manner appear in the Knox circuit court that said last act had ever come in force by its acceptance or that said consolidated company had thereby and by the acceptance of the said act become liable for all acts made or done by the said several companies before the said consolidation, as is provided by the 2d section of said act, of which acts so made or done the appearance to, and defence of, said suit was one.

Wherefore, the plaintiff says that said decision upon said demurrer was not in any manner a decision of this case upon its merits and does not in any manner bar this action.

Wherefore, &c.,

J. B. NILES &
PORTER, HARRISON & HINES,
For Plff.

And afterwards, to wit, at the May term of said court, on the
31 28th day of May, 1873, before the honorable Thomas Drummond, and the honorable Walter Q. Gresham, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Asa Iglehart, esq., its attorney, and files its demurrer to the plaintiff's replication, in the words following:

Said defendant demurs to the plaintiff's reply, and for cause of demurrer states—

1. Said reply is insufficient in law to enable the plaintiff to have and maintain her said action.
2. Said reply does not state facts sufficient to constitute a defence to said defendant's plea.
3. Said reply does not state facts sufficient to constitute a good reply not to avoid the said defendant's said plea.

ASA IGLEHART,
Atty. for the Defendant.

And afterwards, to wit, at the May term of said court, on the 9th day of June, 1873, before the honorable Thomas Drummond, one of the

judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and the court being sufficiently advised, doth now sustain the demurrer of the defendant to the plaintiff's replication herein; to which ruling of the court the plaintiff now excepts.

And afterwards, to wit, at the May term of said court, on the 2d day of July, 1873, before the honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

And, now here comes the defendant and moves the court for final judgment against the plaintiff on the defendant's demurrer to the plaintiff's replication, which demurrer was heretofore sustained; and the plaintiff being duly called comes not and fails to further reply to the defendant's defence pleaded herein.

It is therefore considered by the court, that the plaintiff take nothing by his action, and that the said defendant recover of and from the said plaintiff her costs and charges herein expended, taxed at $.

And afterwards, to wit, on the 24th day of September, 1873, at the May term of said court, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff by counsel and files her motion for a writ of error to the Supreme Court of the United States herein, which is allowed upon her filing a bond for costs in the penalty of five hundred dollars, ($500,) to be approved by the court.

And afterwards, to wit, at the May term of said court, on the 9th day of October, 1873, before the honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by counsel, and files her bond on writ of error herein in the penalty of $500, which is approved by the court and ordered to be filed.

And said bond is in the words following, to wit:

Supreme Court of the United States.

HENRIETTA S. GOULD, EXECUTRIX OF LAST will and testament of Charles Gould, plaintiff, *v.* THE EVANSVILLE AND CRAWFORDSVILLE RAILroad Company, defendant.	Error to circuit court, U. S. district of Indiana.

Know all men by these presents that we are held and firmly bound unto the above-named Evansville and Crawfordsville Railroad Company in the sum of five hundred dollars, to be paid to said defendant, its successors, or assigns, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents. Sealed with our seals and dated this 1st day of October, 1873.

Whereas the above-named Charles Gould hath prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is, that if the above-named Charles Gould shall prosecute his said writ of error to effect, and answer all costs that may be adjudged or awarded against him if he shall fail to make good his plea, then this obligation to be void; otherwise in full force.

O. H. PALMER. [SEAL.]
GEO. H. MUMFORD. [SEAL.]
R. H. ROCHESTER. [SEAL.]
HENRIETTA S. GOULD. [SEAL.]

Sealed and delivered in presence of—
CHARLES W. GOULD.

35 Taken and approved by me this 19th day of October, 1873.
W. Q. GRESHAM, *Judge.*

36 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, J. D. Howland, clerk of the circuit court of the United States, do hereby certify that the above and foregoing is a full, true, and complete transcript of record of the proceedings in the above-entitled cause, as the same is of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Indianapolis, in said district, this 10th day of October, A. D. 1873.

[SEAL.] J. D. HOWLAND, *Clerk.*

37 UNITED STATES OF AMERICA, *ss:*

To the Evansville and Crawfordsville Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of Indiana, wherein Henrietta S. Gould, executrix of the last will and testament of Charles Gould, deceased, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in this behalf.

Witness the honorable Nathan Clifford, Chief Justice of the Supreme Court of the United States, this 9 day of October, 1873.

W. Q. GRESHAM, *Judge.*

37½ This writ duly served and copy furnished.
Oct. 11th, 1873.

ASA IGLEHART,
Att'y for Defendant in Error.

38 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said circuit court before you, between

Henrietta S. Gould, executrix of the last will and testament of Charles Gould, deceased, and The Evansville and Crawfordsville Railroad Company, a manifest error hath happened, to the great damage of the said plaintiff in error, as by her complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first day of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathaniel Clifford, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 9th day of October, A. D. 1873.

[SEAL.] J. D. HOWLAND, *Clerk.*

(Indorsement on cover:) No. 125. Henrietta S. Gould, extx. of Charles Gould, decd., plaintiff in error, vs. The Evansville and Crawfordsville Railroad Company. Indiana C. C. U. S. Filed 13th December, 1873. Jno. B. Niles, for pl'ff in error. La Porte, Ind.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

Supreme Court

OF THE UNITED STATES.

No. 125, October Term, 1875.

HENRIETTA S. GOULD, EXECUTRIX of, &c., of Charles Gould, deceased,
Plaintiff in Error,

vs.

THE EVANSVILLE & CRAWFORDSVILLE RAILROAD COMPANY,
Defendant in Error,

Error to the Circuit Court of the United States for the District of Indiana.

Brief of Plaintiff in Error.

I.

This was an action by the plaintiff in error against the defendant in error, to recover the amount of a judgment rendered by the New York Supreme Court

in favor of Charles Gould, the plaintiffs' testator, against the *Evansville & Illinois Railroad Company.*

The defendant pleaded in bar the sustaining of a demurrer to a complaint on the same judgment in the Knox Circuit Court of Indiana. A demurrer to that plea was overruled; whereupon the plaintiff in error replied, setting up alleged material differences between the facts stated in the declaration in this case, and those set up in the complaint in the Knox Circuit Court, and claiming that the judgment on the demurrer to the complaint in the last named court was not a judgment on the merits of this case. To this reply a demurrer was sustained; exception taken, and judgment in favor of the railroad company on the demurrer, to reverse which, this writ of error is prosecuted.

For the convenience of the court, we here present a partial summary of the facts stated in the pleadings:

1st.—As shown in the declaration in this case.

In January, 1849, an act was passed by the General Assembly of the State of Indiana, incorporating *The Evansville & Illinois Railroad Company*, to build a railroad from Evansville on the Ohio river, to Princeton, and thence to the west line of the State.

By an amendment passed in 1850, the company was authorized to construct its road from Princeton to Vincennes.

This *Evansville & Illinois Railroad Company* was organized, built some twenty miles of it road, acquired a large amount of property, and the litigation which resulted in the judgment, to recover which this suit was brought, had been commenced and was being prosecuted against it in New York.

By a subsequent Act of February 6th, 1851, the Wabash Railroad Company was incorporated to build a railroad from Vincennes to Crawfordsville; by the

27th section of which it was authorized to consolidate with the first named company.

While the matters in controversy between the plaintiff's testator and the original *Evansville & Illinois Railroad Company* were being litigated in New York, it and this Wabash R. R. Co. formed a consolidation under *the original name* of the *Evansville & Illinois Railroad Company*, thus retaining the name by which the suit in New York had been brought against the original company; and the consolidated company *under that same name in which the said suit had been brought, continued to appear to and defend* the action in New York.

In March, 1853, another act was passed, declared to be a *public act*, but which was to *be in force only after its acceptance by the company*, by which, among other things, the fact of the adoption by the consolidated company of the *original name* was recited, and the name *was thereby* changed to "*The Evansville & Crawfordsville Railroad Company.*"

This act is recited in the replication. Its importance will be noticed hereafter.

The declaration in this case *averred the acceptance of this act* by the company which continued to appear to and defend the action in New York under its original name, which was the one also first adopted by the consolidated company.

The Wabash Company, with which the consolidation took place never owned any property, but the act by its acceptance, *made it distinctly liable in all such matters as the New York litigation.*

2d. To this declaration the defendant in error filed a plea of alleged former recovery, as mentioned above.

The plea (p. 5 of record) sets up the sustaining of a demurrer to the complaint in the State court and judgment thereon, and sets forth a copy of that complaint.

That complaint, after reciting the recovery of the judgment in the New York Supreme Court against the Evansville & Illinois Railroad Company, merely stated

that by the 27th section of the act to incorporate the Wabash Railroad Company the two companies consolidated under the name of the *Evansville & Crawfordsville Railroad Company* (not of the Evansville & Illinois Railroad Company, as was the fact); and that by the act of Feby. 4th, 1853, above recited, that consolidation was approved. But it did not aver the acceptance of the act by the company—thus leaving that act wholly out of the case.

A replication was filed, to which a demurrer was sustained, and exception taken.

The ruling on this demurrer presents the questions in this case.

[NOTE.—It is proper, however, to note that there are several typographical errors in the printed copy of this replication, the more material of which are "revision" for "revivor," in last line, first paragraph, p. 10; "defense" for "allowance," and "trust" for "to wit," in lines 1 and 2, paragraph 27, p. 10; and quotation marks should precede the words "and the plaintiffs," &c., in line 3 of paragraph 27, p. 10, immediately following the words "to wit," erroneously printed "trust," as mentioned above, so as to include all the recitals from the declaration in this case, which it is alleged supplied the facts, for the want of which, solely, the complaint in the State court was held not to state facts sufficient to maintain the action.

The word "now," in line 3 of the quotation (line 5, paragraph 27, p. 10), should be "were," thus: "And while the matters in controversy in said action *were* (not *now*, as printed) being litigated," &c.

There is also one noticable error in the second paragraph of the declaration in this case (p. 2 of record), where the printed record reads: "the said plaintiffs recovered against the Evansville & Crawfordsville Railroad Company, by the name of the Evansville & *Crawfordsville*," &c., when it should be "Evansville & *Illinois*," &c., but this error is, perhaps, sufficiently corrected by the context.]

3d. We now call attention to some of the points of difference between the complaint in the State court and the declaration in this case.

In the State court, a consolidation is alleged to have taken place, during the time when the action in New York was pending under the *name of the present defendant in error*, and it is not alleged, as in the declaration in this case, that the consolidated company appeared to the action or that the Act of 1853, changing the name of the company to *Evansville & Crawfordsville*, &c., and making the new company directly liable for the result of that litigation, was ever accepted, or was ever more than a dead letter.

According to the complaint in the State Court, the original company lost its corporate existence, and became merged in another—no means being taken to substitute the new corporation—and the new corporation never appearing to the action, and the name by which it was erroneously alleged that the consolidation took place never appearing in the case—all this, too, while the public act of the Legislature referred to in that case represented that the consolidation took place under a different name, to wit, that of the original *Evansville & Illinois Railroad Company*. The mere allegation in the State Court, that the consolidated company, by its attorney, defended the case which was still pending against the defunct corporation did not make the new company a party to the action.

In contrast with this, the declaration in this case showed, that while the action in New York was pending, a consolidation was effected under the same name by which the original company was sued, and that the new company by *that same name*, being the one adopted in the consolidation, appeared to, and continued to defend the suit, thus rendering any possible revivor or substitution of the new consolidation company unnecessary.

The defect which existed in this respect in the State

Court was wholly obviated in this case by plainly showing that the consolidation was under the name of *the original company*, and that the new company *by that name* appeared to and defended the suit until the judgment now sued on was finally rendered against it, by its true name of consolidation.

The Act of March 4, 1853, changing the name of the consolidated company to that of the present defendant in error, according to the showing in the State Court, was never accepted by the company, and never came in force. In this case its acceptance by the company is specially averred, whereby not only was the name properly changed to that of the present defendant, but according to the terms of that act, so accepted, the present defendant in error voluntarily became liable for "all acts made or done by the consolidated companies and each of them," which included the appearance to, and defense of, the action in New York. This absolutely *bound both branches of the new consolidated company*, under its new name, as fully as if the suit had been brought against it by its present name, after the consolidation had actually been made.

But the differences between the complaint in the State Court and the declaration in this case will more fully appear by the careful comparison of the two.

The replication sets up that these allegations in the complaint in this case *fully supplied all the facts for the want of which alone the demurrer was sustained by the Knox Circuit Court* to the complaint in that case, and that the decision of that court, on that demurrer, was not a decision against the plaintiff on the merits of this case.

Before stating our points, we remark that it seems apparent that no court would have sustained a demurrer to a complaint like the declaration in this case, which shows a judgment directly and personally binding on both of the united companies in their consolidated form, and by the name adopted in their consolidation.

This case in error thus arises upon the decision of the court below by which the demurrer to the replication was sustained and judgment was given thereon.

The question involved in the case, and now presented by writ of error, is whether that decision of the court below was correct.

II.

The plaintiff in error assigns the following errors, which are now asserted and urged, namely:

(1.) The court below erred in holding that the replication was insufficient.

(2.) Also in holding that the plea to which the replication was interposed was sufficient to bar the action.

(3.) Also in holding that an action of debt could be barred by a plea of a former judgment on a demurrer to a complaint stating the same facts as the declaration in debt, such former judgment being upon a demurrer for an alleged want of statement of sufficient facts to constitute a cause of action.

(3.) Also in holding that the complaint in the former suit presented the same state of facts as the declaration and replication in the present suit.

III.

The plaintiff in error makes the following points and argument.

First Point.

The record concedes that the money is justly due and unpaid, but the defendant seeks to avoid payment by a technical estoppel *in invitum.*

Where a judgment is offered as an estoppel, it is by legal presumption *judicium in invitum, and must be strictly construed.*

Best on Evidence, 468.

"The rule that such estoppel must be certain to "every intent is peculiarly applicable to estoppels by "record and judicial proceedings, and for this reason "must show the precise points determined, and when "a judgment is used in pleading as a technical estop- "pel it must appear by the record of the prior suit "that the particular controversy sought to be con- "cluded was necessarily tried and determined."

Herman on Estoppel, pp. 87, 88.
Kerr v. *Hays,* 35 N. Y., 331.
Eastman v. *Cooper,* 15 Pick., 276.
Gilbert v. *Thompson,* 9 Cush., 348.

It is altogether straining the doctrine even to hold a litigation concluded by an erroneous legal opinion of a court on a demurrer. Nothing of that kind is allowed upon any other opinion on a point of law delivered between the parties.

It is the settled law of Indiana that such a judgment is not an estoppel or bar.

Stevens v. *Dunbar,* 1 Blackford, 56.
Sperry v. *Forseman,* 6 Blackford, 56.

There is no principle on which such a judgment can be treated as as estoppel. The court has found no fact: the record determines no fact. The party demurring admits only the matters well pleaded; and as the conclusion of the court is that the pleading does not state sufficient facts, the demurrant is found to admit nothing. The record, therefore, is not any admission on his part to bind him, and the mutuality necessary to an estoppel therefore does not exist.

The proposition in Gould's Pleading, part 1, c. 9, § 45, that such a judgment is a bar, is unsustained by the cases the author cites, and it is a mere personal opinion of the author, growing out of his theoretical process of treating the general subject of pleading. He lost sight of the broad difference between the decision of a question of fact, which binds the parties both in the suit where it is pronounced, and in subsequent suits, and the decision of a question of law, which binds them only in the suit where it is pronounced. The determination of a question of law, such as the sufficiency of a pleading to sustain or bar the action, cannot conclude or estop the parties when they meet in another action. Such a rule as Gould lays down would defeat the law itself as to one litigant, by showing a decision on a like legal point against him, while the court would be free to hold the legal rule otherwise as to other litigants.

Second Point.

A judgment against a plaintiff on a demurrer to a declaration has never been held to be an estoppel, except in rare cases where absolute identity is shown, and it clearly appears that the very merits of the new case were

necessarily determined in the decision upon the demurrer.

Stephens v. *Dunbar*, 1 Blackf. R., 56.
Sperry v. *Forseman*, 6 Blackford, 56.
Lilman v. *Rivers*, 10 Peters, 298.
Wilbur v. *Gilmore*, 21 Pick., 250.

Such a decision and judgment that the plaintiff take nothing by his suit is only equivalent to a judgment of nonsuit—that the defendant go hence, and the plaintiff take nothing by his suit; and such a judgment, even an agreed state of facts, is held to be no bar.

Inhabitants of Knox v. *Inhabitants of Waldborough*, 5 Greenleaf, 185.
Wilbur v. *Gilmore* (*supra*), 21 Pick., 253.
Bridge v, *Sumner*, 1 Pick., 370.
Morgan v. *Bliss*, 1 Mass., 111.
Ensign v. *Bartholomew*, 1 Met., 276.

In 1st Blackford, 56, *supra*, the court say: "A judgment in favor of the defendant upon demurrer to a declaration is no bar to a subsequent suit for the same cause."

In *Gilman* v. *Rives*, 10 Peters, 298, the court say: "A judgment that a declaration is bad in substance, which alone, and not matter of form, is the ground of a general demurrer, can never be pleaded as a bar to a good declaration for the same cause of action."

In *Lampen* v. *Kedgewin* (1 Mod. R., 207). North, C. J., delivering the opinion of the court, says: "*There is no question but that if a man mistake his declaration, and the defendant demur, the plaintiff may set it right in a second action.*" The report concludes by saying: "*The other judges agreed with him in omnibus.*"

In *Hutchin* v. *Cambell* (2 Wm. Blackstone, 827 831), it is said of the rule that a judgment is a bar, "*Though the goods were averred to be the same*" (as here

the judgment is averred to be the same), "*it did not appear that the question was the same*;" and it is also laid down that a former judgment is not a bar "where "the judgment was given for faults in the declaration "or pleadings."

In *Washington et al.*, v. *Sickles* (24 How., U. S., 333), the limits of the rule were partly indicated by the court, *sufficiently to defeat the estoppel* set up in that case (pp. 345, 346). The conditions of a prior judgment to make it a bar are hinted at on pp. 341, 342. The identity of the *thing demanded, and the identity of the persons and character of the litigation* are not enough; there must be *an identity of the cause of the demand*; "*eadem causa pretendi.*" The record must present *eadem questio.*

The recognized exceptions to this rule are well illustrated by the case of

Goodrich vs. *the City of Chicago*, 5 Wall., 566.

In that case the question was as to the right of Goodrich to recover against the city under a special statute of the State, and in a case between the same parties on substantially the same facts the Supreme Court of the State had held that the statute created no such liability, and gave no such remedy as was claimed. Such a decision by that court necessarily settled against the plaintiff the entire matter in controversy, and was most distinctly a decision on the merits, striking at the root of the plaintiff's cause of action, and binding on the Federal courts.

There was no recorded case in conflict with the doctrine as above laid down, till after the publication of Gould's Pleading; and the rule as stated by him (Ch. 9, Part 1, § 44) rests on the author's theoretical notion of pleading, and not on adjudications, and the English cases cited by him are not in point.

Lampen v. *Kedgewin*, 1st Modern, 207, one of the cases cited, had reference to a demurrer to *a plea*, and

its effect, and implies that the sustaining of a demurrer to a declaration would be no bar. So in the case in Croke's, Eliz., 668, two judges held that a judgment against the plaintiff on a demurrer *to a plea* was a bar. Two held it *no bar*, and Walmsley, Judge, added, "and so it is if such a case appear on demurrer" (as we understand) to a declaration. The judges being equally divided, the case was adjourned, and the controversy was afterwards arbitrated.

Sir Humphrey Ferrer v. *Arden* (*Cro. Eliz.*, 667, *Case* 24.

In *Wilbur* v. *Gilmore* (21 Pickering, 250, 253), the court say:

"If the declaration be demurred to, or a bad plea be "pleaded and demurred to, and a judgment be ren- "dered against the plaintiff for the insufficiency of his "declaration, it will not estop the plaintiff from "bringing another action to enforce the same right, "because the last declaration was not tried in the "first."

Judge Morton then quotes North, Ch. J., in 1. Modern, 207: "There is no question but that if a man "mistakes his declaration, and the defendant demurs, "the plaintiff may set it right by a second."

Of the few American cases relied on, those in 5th California R., 428, and 16th Alabama R., 17, were evidently founded entirely on the dictum in Gould's Pleading; and in *Goodrich* vs. *The City of Chicago*, the rule requiring a high degree of certainty to sustain an estoppel *in invitum* by matter of record, was fully met. The contrast in this respect, between that case and the case at bar, seems too plain for argument.

This court will notice that the State of Indiana had adopted the very modern system of pleading introduced by the New York Code of Precedure. The action in the State court was by a complaint, and the judgment in it was on a demurrer for not stating sufficient

facts. In such cases the former judgment is of less force than if it had been rendered on a common law issue.

Herman on Estoppel, § 93: "There are many reasons why the plea of *res adjudicata* should be more "cautiously received under the code system of pleadings than is or was necessary under the common law "system of pleadings."

§ 94. The author points out a difference to be observed between judgments on verdicts and judgments on demurrer; the one being certain as to what was determined, and the other being "often of very doubtful "construction, leaving it difficult to determine whether "the judgment was intended to sustain the demurrer "as to all the matter demanded, or only partially."

Third Point.

In the present case, the plaintiff's suit ought to have been sustained, even if the *dictum* of Gould's Pleading was held to be sound law; because the plaintiff in this suit supplies averments which were lacking in the complaint in the State court.

Gould says (P. 2, c. 9, § 45): "But if the plaintiff "on demurrer fails in his first action from omission "of an essential allegation in his declaration, which "allegation is supplied in the second, the judgment in "the first is no bar to the second, although both actions "were brought to enforce the same right. For in this "case the merits of the cause, as disclosed in the "second declaration, were not decided in the first."

35 N. Y., 331, Kerr *v.* Hays.

"In order that a judgment in another action be-"tween the same parties shall constitute an estoppel,

" it should be made to appear that the identical ques-
" tions involved in the issue to be tried were passed
" upon by the court or jury at the former trial."

In the case at bar, the plaintiff had been defeated in the State Court, on demurrer, for want of essential averments in the complaint; which defects are supplied in this action, as will more fully appear in the following points:

Fourth Point.

The Supreme Court of Indiana has decided that the consolidation of one railroad company with another, under the statutes of that State, is a surrender of its original charter.

State, on relation of Brown, v. *Bailey*, 6 Ind. R., 46.

In the suit between these parties in the State Court, therefore, it was shown that, during the progress of the litigation in New York, the defendant corporation ceased to exist as such. Under the ruling of the Indiana Supreme Court, then in force, the inferior court was bound so to hold; and the case required no revivor, nor the substitution of the new consolidated company. Its new name, adopted under consolidation, as erroneously given in the complaint in the Indiana State court, nowhere appears in the New York case; and the allegation, in the present action, that the new company, by its attorney, defended the suit in New York, is not an averment that the new company became a party to the suit; nor does it involve any such averment, for persons not being parties may, and often do, defend suits. When this is considered in connection with the fact that so far as the

State Court was informed, the act of February 4, 1853, changing the name of the new company *from* its true, original name of Consolidation to *Evansville & Crawfordsville, &c.*, and creating the direct special liability, had never been accepted or come in force, it may well be presumed that these considerations alone might have led that court to consider the complaint defective in *its statement of the facts* required by the Indiana Code. In marked contrast, all these allegations are fully supplied in the new case, while it is distinctly alleged in the reply that *it was solely for te want of just such allegations that the State Court sustained the demurrer* to the complaint in that court, as being wanting in its statement of facts. In contrast, the new complaint presents clearly the *intermediate or transition state* of the company and its assumption of the present name; and that while there was *a sort of abatement by death* in the first complaint, there is a perfect *revivor* in the new one. A revivor by successors in right or duty may be *formal* (through *scire facias*, petition, &c.), or it may be *informal* by actual intervention of the successors in a cause, without change of nominal parties. The first complaint did not allege that the judgment was in fact against the new company, by the old name, which leading and controlling fact is now shown.

Fifth Point.

The complaint in the State Court went on the idea that the consolidation of two railroad companies necessarily and at once makes the consolidated company *a party to* and immediately liable in all suits and proceedings against either of the original companies. The contrary doctrine is maintained by high authority.

Prouty v. *The M. S. & N. I. R. R. Co.*, 52 *N. Y.*, 363.

Ohio & Mississippi R. R. Co. v. *Wheeler*, 1 *Black*, 237.

Sixth Point.

There is one other point which alone would seem sufficient to reverse the judgment, though it may be said to be purely technical, and for that reason is presented less prominently.

The Indiana Code of 1852 (2d G. & H. Statutes, p. 104, sec. 78) requires that when a pleading is founded on a written instrument a copy of the instrument shall be filed with the pleading, and it is provided that such copy shall form part of the record.

Until long after the ruling on this demurrer in the Knox Circuit Court, it was uniformly and repeatedly held by the Supreme Court of the State that this statute included judgments, and that whenever a pleading was founded on a judgment it was bad on demurrer, unless a copy was filed with the pleading.

In *Brady* vs. *Murphy*, 19 Ind. R., p. 258, the court say: "It is the settled rule of pleading in this State that where a party makes a judgment of a court the foundation of his action or defense, he must make the record of such judgment, or a transcript of it, a part of his pleading, setting it out as in case of a written instrument."

In Smith *vs.* Cox (21 Ind. R., 15), on a demurrer sustained to a paragraph of an answer, the court say:

"As to the demurrer, there is no doubt it was well taken, because the paragraph of the answer was based upon the judgment of the court, and a transcript of the record was not filed."

Same doctrine in *Pringle* vs. *Weston* (23d Indiana, 588), and other cases.

These decisions were law for the inferior courts of the State, when this ruling was made, and whatever different view of the statute may have been long subsequently taken by the Supreme Court, is immaterial.

But the same doctrine has been recognized and pronounced in a decision delivered by the Supreme Court of Indiana, December 13, 1875, in the case of *Montgomery* v. *Gorrell*, the report of which is published in the *Indianapolis Daily Journal* of December 14, 1875, as follows:

> 3,829. Nathaniel Montgomery *et al. vs.* John F. Gorrell *et al.* Jefferson Circuit Court.
>
> PETTIT, J.—The action was originally brought by Nathaniel Montgomery, Catharine Montgomery, Alexander Montgomery and Delilah Montgomery, against John F. Gorrell, for possession of realty. Gorrell filed an answer of general denial, and also two paragraphs called by him "answer and cross-complaint," asking to have his wife, Mary J. Gorrell, and also Catharine Montgomery, widow of Alexander Montgomery, deceased, Johnson Montgomery and Jacob Montgomery made defendants, which was done by the court.
>
> The third paragraph of cross-complaint is founded solely on a written instrument, and neither the original or a copy is filed with it. Saying in the complaint that a copy is filed is not sufficient. The instrument or a copy must in fact be filed and made a part of the pleading, and the record must show these facts.
>
> The special answers of the widow, Johnson and Jacob allege the testacy of their ancestor, specifically setting forth that part of his will in which this property is devised solely to the four original plaintiffs, and then as to themselves set up a disclaimer to any portion of it. If the facts in these special answers are true, certainly Gorrells could have no right of action against either of them, be-

cause whatever title their ancestor may have had in the land vested at his death in the four original plaintiffs, subject to whatever claim Gorrells or anybody else might have, no part of it was left in abeyance or dependent on any contingency that could ever vest even the shadow of a claim in either of these three defendants. It was therefore error to strike out their special answers.

Judgment reversed with costs, with instructions, etc.

The averment in the complaint, that a copy was filed, does not dispense with the actual filing of it, or with its being set forth in the plea now under consideration, in case it actually was filed.

Seventh Point.

In *Goodrich* vs. *The City of Chicago* (*supra*), as we have seen, the opinion of the Supreme Court of Illinois, by its construction of the statutes in the previous suit, had made a final end of litigation on the *very merits of the case.* Had that opinion, on the contrary, shown that the demurrer was sustained solely on collateral points, which were fully supplied in the second case, the estoppel must have failed.

Here the facts *are supplied*, for the want of which the demurer, as is distinctly alleged, was sustained; so in this case had the State court given a written opinion making it a part of the record, and showing that the demurrer was sustained only for the want of such facts as are supplied in the new case, its ruling on the demurrer would not be taken as a decision against the plaintiffs *on the merits of the present case.* Such, however, would be the reasonable presumption even in the

absence of the direct averment; otherwise the decision of the State court was no less than an arbitrary and wanton denial of justice in open violation of that provision of the Federal Constitution which guaranteed full faith and credit to the judicial proceedings of sister States—an imputation which courts will seek by all reasonable intendments to avoid, and not necessary to be indulged in this case.

Eighth Point.

Without enlarging on the points of difference between the pleadings in these two cases, we submit the following propositions:

(1.) The bar or estoppel by prior judgment on demurrer to a declaration is an extreme stretch of the theory of the common law, very little countenanced by adjudicated cases.

(2.) The rule is not universal in its nature, and is subject to many exceptions.

(3.) It is never applicable unless the two declarations present not only the same subject of action and the same demand, but also allege *precisely the same grounds of recovery.*

(4.) A difference in the mode or form of stating facts may suffice to defeat the estoppel.

(5.) In the case at bar the new declaration clears the case of the very difficulties the former suffered from; and it is a fair instance of the rule that "he who has lost on demurrer by mistaking the declaration, may right himself by a new action."

1 Mod., 207, *supra.*

(6.) The new declaration shows a *practical revivor* which is stronger than a formal revivor, and makes out that the judgment in New York was a judgment against the new corporation now sued by the name of the old corporation, it being in fact the one adopted by itself in the consolidation, and that the two were one and identical.

7.) There are divers averments in the new declaration, not contained in the former complaint, and all of them state material facts. The court cannot hold the two suits to be alike, where the *causa pretendi* is thus diverse.

(8.) There is absolutely no adjudicated case to be found in the books, where a former judgment on demurrer to a declaration was sustained as a bar, unless *the former pleading was in all respects identical with the subsequent one.*

(9.) And no court will extend the rule to cases not covered by distinct precedents, in order to uphold an unconscionable defense and defeat an honest debt.

Ninth Point.

The allegation in the plea that the judgment in the State court was rendered "on the merits" (p. 8, line 2) adds nothing to the strength of the plea; for there was nothing before the State court to act upon but the complaint (p. 5, at foot, to p. 7, l. 7), and the demurrer thereto (p. 7, marg. no. 19).

That allegation cannot be available on this demurrer, for a further reason, namely, that it is directly trav-

ersed by the replication, where the plaintiff states that the decision was not upon the merits (p. 11, fol. 30); and if the allegation in the plea was material, it is in issue by the replication, and the demurrer, therefore, cannot be sustained.

Tenth Point.

The judgment of the court below should be reversed, and a mandate issued, requiring the rendering of judgment final of recovery in favor of the plaintiff.

JOHN B. NILES, of La Porte, Ind.
CHARLES TRACY, of New York, N. Y.,
Of Counsel.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

HENRI GOULD, Ex.

VS.

THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY.

ARGUMENT BY

Asa Iglehart and Jno. E. Iglehart,

Counsel for Defendant in Error.

EVANSVILLE:
T. J. Groves & Co., Steam Book and Job Printers.
1875.

Supreme Court of the United States

IN THE

Supreme Court of the United States

HENRIETTA S. GOULD, Executrix of CHARLES GOULD, deceased Plaintiff in Error vs. THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD COMPANY, Defendant in Error.	Error to the Circuit Court for the District of Indiana,

Argument in Behalf of Defendant in Error.

May it Please the Court:

This was an action of debt upon a judgment, rendered against the Evansville and Illinois Railroad Company, in favor of the plaintiff's testator, in the Supreme Court of New York.

The declaration contained three counts, but the first and second being *nol. pross'ed*, only one count remained. The

declaration then, as finally amended, sets out: (1) That in 1849, by an act of the Indiana Legislature, a corporation was organized by the name of "*The Evansville and Illinois Railroad Company.*" (2) That in 1850, an amendatory act was passed, authorizing said corporation to further extend its road. (3) That in 1851, an act was passed by the same Legislature whereby a corporation was constituted under the name and style of the "*Wabash Railroad Company.*" (4) That by the 27th section of the last named act said last named company and said first named were authorized to consolidate their charters and become one company, with all the rights and privileges of both their charters with their amendments. (5) And by which it was further provided that the consolidated company should assume such name as their directors might determine upon. (6) *That prior to the consolidation of said corporations, said Evansville and Illinois Railroad Company had actually located and constructed part of its road, viz: 20 miles, and had acquired property of the value of $300,000.* (7) That the *Wabash Railroad Company owned no property.* (8) That in 1852, after the commencement of the suit, on which the judgment sued on was rendered, the *Evansville and Illinois Railroad Company and Wabash Company* consolidated, *and the consolidated company took and appropriated to its own use all the property of the Evansville and Illinois Railroad Company and the Wabash Railroad Company.* (9) That on the 6th day of April, 1851, the plaintiff's testator impleaded the Evansville and Illinois Railroad Company in the Supreme Court of New York. (10) That the said company before the change of name, appeared and pleaded to the action; (11) *and that after said consolidation, said consolidated company, under the name of said Evansville and Illinois Railroad Company, did continue to appear and defend said action in said Supreme Court.* (12) That such further proceedings were had in said court; that on the 3d day of August, 1860, the judgment sued on was rendered against

the said Evansville and Illinois Railroad Company. (13) *That on the 3d day of March, 1853, and after the consolidation, an act of the Legislature was passed ratifying said consolidation and changing the name of the consolidtaed company to that of the "Evansville and Crawfordsville Railroad Company."* (The act is set out in the pleading and corresponds with the allegations.) (14) *That said last named act was presently after its passage, to-wit: in 1853, duly accepted by the corporation, and the same hence became, and was and is, said defendant corporation under said name, and is, therefore, liable for the debts of the constituent companies.*

To this declaration the defendant filed a single special plea.

This plea alleged in substance that, at the August term, 1865, of the Knox Circuit Court, in the State of Indiana, the plaintiff's testator impleaded the defendant in said court, upon the same cause of action, and upon the "same grounds;" that a complaint was filed; that process was issued and served upon the defendant; that thereupon the defendant appeared to the action, filed a demurrer to the complaint, alleging that the same did not state facts sufficient to constitute a cause of action; that thereupon the said Knox Circuit Court sustained said demurrer, and adjudged that said complaint did not state facts sufficient to constitute a cause of action; and that thereupon it was considered and adjudged by said Knox Circuit Court; that the plaintiff take nothing by his suit, and that the defendant recover its costs, etc.

The complaint, exhibits, demurrer and record entries in the case in the Knox Circuit Court are set out in the plea, *in haec verba*.

The complete record of the case in the Supreme Court of New York, which resulted in the judgment sued on in the case at bar, is made an exhibit to the complaint in the State Court, and is copied into the plea by which the identity of the judgment is fixed beyond question. The allegations in the complaint in the State Court are identical with

those in the declaration here, with the following exceptions:

(a) The allegations in the declaration marked or indicated as (6) and (7) respectively above are wanting in the complaint.

(b) The language of the declaration and the complaint differ again in the allegation marked (11). The complaint runs thus: that "after said consolidation, and from thence henceforth to the rendition of the judgment * * * the defendant herein (the E. & C. R. R.) by attorney, directed and managed the defense in said suit wherein said judgment was rendered."

(c) The allegation marked (14) above is wanting in the complaint.

(d) The allegation in the complaint, corresponding to 13 above, is different, however, and supplies this omission. It is in substance as follows: It sets out the organization of the E. & I. Co., and the Wabash Company, and then avers: "That, after the commencement of the suit in New York, to-wit: on the 4th of March, 1853, the E. & I. R. R. Co. and Wabash R. R. Co. consolidated and adopted the corporate name of 'The Evansville and Crawfordsville Railroad Company,' and assumed the liabilities of both companies, and in said corporate name took possession of all the effects and property of said several companies, and converted the same to its own use; and then avers that after said consolidation and adoption of said corporate name, by an act of the Legislature, said consolidation and adoption of name were approved by the Legislature."

The plea avers that the several acts of the Legislature set out or referred to in the declaration are the same as those referred to in the complaint in the State court.

A general demurrer was filed to the plea, which was overruled, and the act of Congress of 1872, adopting the code in law cases, having gone into effect, the plaintiff excepted, and filed a replication. (Reply) To this replication

a demurrer was filed by the defendant below and sustained by the Court, and final judgment was rendered for the defendant.

The replication to which the demurrer was filed is an argumentive denial of the identity of the ground of action in the State Court with the one at bar, and sets out in detail the alleged material allegations omitted in the complaint in the State court, and supplied in the declaration in the case at bar. This alleged difference is the same we have pointed out above, and we have indicated those averments which are said to distinguish the declaration from the complaint by *italics* or by "quotation marks."

This writ of error is prosecuted to reverse the judgment of the court below upon two grounds, upon the ruling of the Court thereon:

1. That a final judgment upon demurrer to a declaration, in favor of the defendant, is not a judgment upon the merits, and cannot be pleaded in bar to a subsequent action for the same cause. In other words it is claimed that a plaintiff can not be barred of his action by suffering judgment upon demurrer to his declaration.

2. Admitting that a judgment upon demurrer to the declaration, in favor of the defendant, is a bar in cases where the causes of action are identical, and the same alleged grounds are relied upon for a recovery, still it is insisted that the necessary identity is wanting here.

We will discuss these propositions in their order.

I.

There are two famliar maxims which are of universal application, and which are recognized as necessary to the peace of society, viz.: "*Nemo debet bis vexari, si coustat curiae quod sit pro una et eadem causa,*" and "*Interest Reipublicae ut sit finis litium.*" There might seem to be a single exception to these maxims, but it is only apparent when carefully examined. The proposition has long been maintained, without question, that if the plaintiff mistake his

form of action, or if he omit any material averment, and his declaration be adjudged bad, he may set it right in another action, and if the former judgment be pleaded in bar, the plaintiff may reply, traversing the identity of the actions, and thus avoid the bar. Hence we see that, although the defendant may be twice vexed for the same cause of action, it is only when the proper grounds for a recovery in the first action are not set forth in the declaration: and, in the language of the courts and text writers, if the plaintiff set forth his cause of action in an insufficient declaration, and the declaration be held ill, and the defendant have judgment, it shall not bar the plaintiff of his action for the same cause, stated in a sufficient declaration.

We then have this as the result of the rulings, a judgment upon demurrer to a declaration is a judgment upon the merits, wherever the declaration is so framed as to enable the Court to determine whether the alleged cause of action entitles the plaintiff to a recovery; and in such case such judgment is a bar to all subsequent actions upon the same cause, and may be so pleaded. Again, if, in the subsequent action, the declaration contain only the same allegations, or substantially the same as the declaration in the first, the former judgment will be a bar. But if a cause of action be stated in a bad declaration, and judgment go for the defendant, upon demurrer to the declaration, such judgment will not be a bar to an action upon the same cause in a good declaration.

So, then, in order that judgment for the defendant upon demurer to the declaration, shall be a bar to a subsequent action for the same cause, one of two things must exist. First. The declaration in the first action must be sufficient to present the merits of the cause of action, or the allegations in the two declarations must be substantially identical; and as a logical sequence to these propositions, in order to take a case out of the rule, the declaration in the former action must have been bad, and that in the latter good.

These propositions, besides being in consonance with the analogies of the law, upon this branch of the doctrine of estoppel, are sustained and illustrated by modern text writers and adjudged cases.

Mr. Gould, in his work on pleadings, lays down the doctrine thus (p. 477, Chap. 9, Sec. 43, 44 and 45): "A judgment rendered upon demurrer is equally conclusive (by way of estoppel), of the facts confessed by the demurrer, as a verdict finding the same facts would have been, since they are established in the former case as well as the latter by matter of record. And facts thus established can never afterwards be contested between the same parties, or those in privity with them."

"If, therefore, on demurrer to the declaration, to the plea in bar, or to other pleadings, in *chief*, judgment is rendered for *the defendant;* the plaintiff can never maintain against the same defendant or his privies any *similar or concurrent* action for the same cause, *i. e.* upon the *same grounds* as were disclosed in the first declaration. For the judgment upon such a demurrer determines *the merits* of the cause, and a final judgment deciding *the right* must put an end to the dispute, or litigation would be endless."

"But if the plaintiff, on demurrer, fails in his first action from the omission of an essential allegation in his declaration, which allegation is supplied in the second. The judgment in the first is no bar to the seeond; although both actions are brought to enforce the same right. For, in this case, the merits of the cause as disclosed in the second declaration were not decided in the first."

See, also, to the same effect, Robinson vs. Howard, 5 California Reports, 428, and Perkins vs. Moore, 16 Ala. Rep. 17.

But this question is not an open one in *this Court.*

Goodrich vs. the City of Chicago, 5 Wall. 566, is every way in point. That was an appeal from the decision of

the Circuit Court of the United States dismissing a libel in admiralty *in personam*, for the value of a boat sunk in the Chicago River, on appeal from the District Court. The respondent in the District Court set up *inter alia*, as a defense by way of estoppel, the fact of a former judgment in the Supreme Court of Illinois, between the same parties, for the same cause of action. The Circuit Court dismissed the libel, and the libellant appealed to this court, where the judgment of the Circuit Court was affirmed.

Mr. Justice Swayne, delivering the opinion of the Court in that case, says:

"* * * * Among the defenses set up by the answer of the respondent was that of a final judgment in the Supreme Court of Illinois, upon a general demurrer to a declaration, in an action at law, by appellant against the respondents on the same cause of action."

"The record of the action at law is found among the proof in the case. Upon a careful examination of the declaration and the libel, we are constrained to say that there is no such difference in the cases which they respectively make, as can take this case out of the operation of the principles of *res adjudicata*.

Again, in Aurora City vs. West, 7 Wall. 100, Mr. Justice Clifford, discussing the subject, says:

"Defence of a former judgment upon general demurrer to the declaration was also set up in the case of Goodrich vs. the City, and this Court held that it was a good answer to the suit, although the appellant insisted that it was not, because the judgment was on demurrer," and citing in the same opinion Perkins vs. Moore and Robinson vs. Howard, *supra*.

"Reference to cases in other jurisdictions is unnecessary. As this Court decided in Clearwater vs. Meredith (1 Wall, 43, based upon Gould's pleadings, Chap. 9, Sec. 42), that on demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been upon an issue of fact joined on the same pleading, and found in favor of the same party."

The learned counsel in the court below charged that the Supreme Courts of Alabama and California are misled by Mr. Gould. The questionable modesty of these assumptions, without counter authority, might be overlooked but for the criticism upon the case in 5th Wallace. The learned counsel should have continued the criticism, because the cases in Alabama and California attributed to mistaken confidence in Gould on pleadings, are referred to in a note to Goodrich vs. Chicago, and the reference is repeated in Aurora vs. West. But the process of reasoning adopted by counsel to break the force of Goodrich vs. the City is still more questionable.

It was assumed *arguendo* that the Supreme Court of Illinois having put a construction upon the law of Illinois, the Supreme Court of the United States simply followed the decision of the Supreme Court of Illinois, as an authority. This would be plausible were there any foundation for the *theory* in the *case*; indeed, we might add, if the case did not from beginning to end contrated the theory. As we have seen, the judgment upon demurrer to the declaration, in a common law case in the Circuit Court, affirmed in the Supreme Court, was set up and relied upon as a bar to a libel in admiralty, upon the same cause of action, and between the same parties, upon the ground, not of an authority, for authorities are not usually *pleaded*, but upon the ground of *estoppel*. It was argued by counsel upon the ground of *estoppel* (see briefs). It was passed upon by the Court in the same way. the Court passing by all the numerous questions discussed by counsel, and deciding simply that the judgment of the State Court, upon the same cause of action, operates (not as an authority) but as an *estoppel*, and additionally we might add the Court, and cite it as an authority to the same effect in Aurora vs. West.

The case of Stevens vs. Dunbar, 1 Blackford, 56; Sherry vs. Foresman, 6 Blackford, 56, and Gilman vs. Rives, 10 Peters, 298, were relied upon in argument, in the Circuit Court. These cases are all within the exception we have

already discussed, and belong to the class enumerated in the last section quoted from Gould on Pleading, where the merits are not involved in the former action. Stevens vs. Dunbar is but the syllabus of a case containing no statement of the condition of the record, nor any statement of facts, or argument of any question of law; indeed, it is but *dicta*, to the effect that a judgment upon demurrer to a (bad) "declaration is no bar to another action for the same cause" (upon a good declaration).

We are justified in supplying the parenthetical words, as this reconciles the opinion with well established principles, and relieves the Court from the charge of making a decision contrary to the current of authority.

Sherry vs. Foresman was an action upon a replevin bond. Pleas were filed, to which demurrers were sustained and judgment was rendered for the defendant. Upon error in the Supreme Court, the judgment of the Court below was sustained upon the ground that the demurrer reached back to the declaration, and that it was bad, because the bond set out in the declaration was joint and several, while the bond set out on *oyer* was *joint only*. "But," says the Court, "as the judgment is to be considered as rendered on a demurer to the declaration, it will be no bar to a subsequent suit on the replevin bond." Citing Stevens vs. Dunbar, and Gilman vs. Rives.

Here, it will be observed, that the decision is but *obiter dicta*, as the question was not in any manner before the court; and further that the court simply intimates that, inasmuch as the declaration in that case is *bad in substance;* that nothwithstanding judgment might be, and was, rendered for the defendant, yet the plaintiff might bring another action, and set forth his cause of action in a *good declaration*, and this judgment could not be set up in bar, and this is doubtless the law, and therefore the *dicta* even is not against, as here. Gilman vs. Rives is also equally harmless as an authority against the defendant in error. That was an action against A, upon a judgment rendered

against A and B, and a general demurrer was sustained to the declaration in the court below for the nonjoinder of B, no reason being shown in the declaration for such *non-joinder.*

The opinion was delivered by Mr. Justice Story, affirming the judgment of the Circuit Court, and like the opinion in 6 Blackf., *supra is but dicta*; but as all the utterances of this distinguished jurist, as well as those of several of his associates, are in very high repute, both with the bench and bar of his country, we quote his language upon the point in controversy here. He says:

"The objection may be urged that a judgment upon demurrer in this case will be a good bar to any further suit brought against the same party for the same debt, or against him and the other judgment debtors. We are of a different opinion as to both, if the declaration be properly framed; for, a declaration bad in substance (which alone and not matter of form, is ground for general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits, and that there might be no difficulty about the matter, the express grounds upon which the ~~demurrer~~ declaration was held bad was stated in the judgment."

This opinion is in our favor. It recognizes the doctrine that if the *former declaration* be *bad* and the *latter good*, a judgment upon demurer to the former against the plaintiff will not bar his action in the latter, and this we freely admit. But argumentatively, this opinion well asserts that if the former declaration be good and still be held bad, and judgment go for the defendant, and the plaintiff, instead of prosecuting his writ of error, bring another action, the *former judgment will be a bar*, because *it is in every sense a judgment upon the merits.*

II.

We will now proceed in answer to the second position

assumed by counsel to show that the complaint in the Knox Circuit Court was sufficient, or, if it was not, that the declaration in the case at bar is no better, or, in other words, *that there is no material allegation wanting* in the complaint, in order to the proper presentation of the merits of the cause of action, and which is supplied in the declaration.

Several points of dissimilarity have been pointed out, to which we have referred, and which we will notice more fully here, and endeavor to show are wholly immaterial.

It is said that in the complaint, in the State Court, the consolidation is alleged to have taken place under the name of the "Evansville and Crawfordsvilly Railroad Company," while in the declaration here it is alleged that the consolidation took place in the name of the original corporation, "The E. & I. R. R. Co.," and it is therefore insisted that the name being changed before the final determination of the suit in which the judgment sued on was recovered, and that the further allegation in the complaint, that the corporation, under the new name, continued to manage the defense to the action till final judgment was rendered, is not sufficient to render the corporation liable. But that the allegation in the *declaration*, that the consolidation took place in the old name, and the corporation, in the old name, continued to appear till the change of name, and after the consolidation and change of name, continued to appear in the old name till final judgment, makes the declaration sufficient on this point.

We have endeavored to give the substance of the allegations in the complaint and in the declaration upon this subject.

Now it is unnecessary to discuss the question, whether either of these pleadings is sufficient, and we shall not do so; for, if the complaint in the State Court was good, as we have seen, the plea is good, and, if the complaint was bad, the declaration is bad, and the demurer reached back to it. But, if we regard the *substance* of

things rather than the *shadow*, we must conclude that the legal effect of the pleadings is precisely identical. Both allege a legal consolidation and the change of name seven years before the rendition of the judgment. We submit that the consolidation of the corporations, the formation of a new entity out of the constituent elements of two old ones, carries with it the right to the corporate property of both constituent corporations, and the liability for the debts of the same.

This liability in general is conceded, but whether, where a suit is pending against one of the constituent bodies, and a consolidation and change of name occurs, and where final judgment is rendered against the constituent corporation in the original name, after the same is extinct, the judgment is void and the creditor is remitted back to his action; or whether any act of the consolidated corporation can render the judgment against the constituent corporation a valid judgment against it, is a question of more difficulty, and one which we need not discuss here. For, if the judgment against the E. & I. R. R. Co. becomes a judgment against the E. & C. R. R. Co., simply because the latter corporation continued, by counsel, to appear in court, in the former name (a thing physically and morally impossible), it will be equally so where such a corporation continued to *direct* and *manage* the suit by her *attorneys*. In the one instance, the allegation that one corporation, by her attorneys, appeared in the name of another corporation, and defended a suit is literally impossible, and the legal effect of the allegation is, that the E. & C. employed attorneys, who continued to appear in court and defend the suit in the name of the E. & I. Co. Whereas, in the other case, the only manner in which the former company could, by her attorneys, direct and manage the suit in the name of the latter company, would be by such attorneys continuing to appear in court in said suit; and so, if the declaration is good in this respect, the complaint is good, and if the former is bad, the latter is, and we might have

dismissed this objection by saying that the distinction is without substantial foundation. Indeed, it is quite shadowy.

But it is insisted that there is another difference in the pleadings, which is substantial, because it is averred in the declaration that the E. & I. Co. had $300,000 worth of property, whereas any averment of this sort is wanting in the complaint. This averment in the declaration is immaterial. The liability results from no such a consideration; it follows as a result of the consolidation. 2 Redfield on Rwys 659, et seq., I. & C. R. R. Co. vs. Jones, 29 Ind. Reports, 465, sustains this view, there, the action was founded in tort for a cause of action accruing against one of the constituent companies, and the court hold the consolidated company unconditionally liable.

Again, it is insisted that the complaint in the State Court was bad for want of an allegation that the directors of the corporation accepted the act changing the name of the same to its present name, the act, by its terms, taking effect when thus accepted, and that this objection to the declaration here is obviated by the plaintiff, by making the averment that the act was accepted by the directors of the corporation, and this is urged as another material allegation wanting in the complaint, in the State Court, but supplied in the declaration, in the case at bar. But we submit that the complaint was good without the averment, the equivalent averment being contained therein. It will be observed that the complaint and declaration differ here, as we havc shown above, the complaint alleging that the two corporations were consolidated in pursuance of a certain act, and assumed the present name of the defendant, and afterwards the Legislature approved the codsolidation with the change of name. Now, although it is elementary that where a corporation charter is amended, the corporation may accept or reject the amendment, and the option is not made stronger by putting it in the act. Still it will hardly be pretended that a pleading, showing ~~in approving~~ the assumption of a new name, would be bad for not averring that

the corporation accepted the act approving that which it had already assumed and acted under for a year.

The case is this, the law authorizes a consolidation. No approval is necessary by the Legislature, and the averment of approval of the consolidation in the complaint is unnecessary, but the company, at the time of the consolidation, takes upon it a new name and acts under it for a year, at the end of which time the Legislature ratify the change of name under which the corporation is already acting; in a suit against the corporation, sued in the new name, is an averment of an acceptance of the act ratifying such an assumption of name necessary? Surely not.

But if such an allegation is required, it is not wanting in the complaint. It is not necessary in such case, in any event, to make a direct averment, or offer proof of an actual acceptance of the act, if the act be the change of name, it is sufficient to show the use of the name. The complaint shows the assumption and use of the name before the act, and avers that the defendant is a corporation under that name at the time of suit, and, under the code, it is sufficient if the pleader states facts from which the law will imply the given point to be established or from which it is logically inferrable.

It can hardly be pretended that it required greater strictness in showing an acceptance of an amendment than in the acceptance of the original charter, and in that case mere acts of of user are all that are necessary.

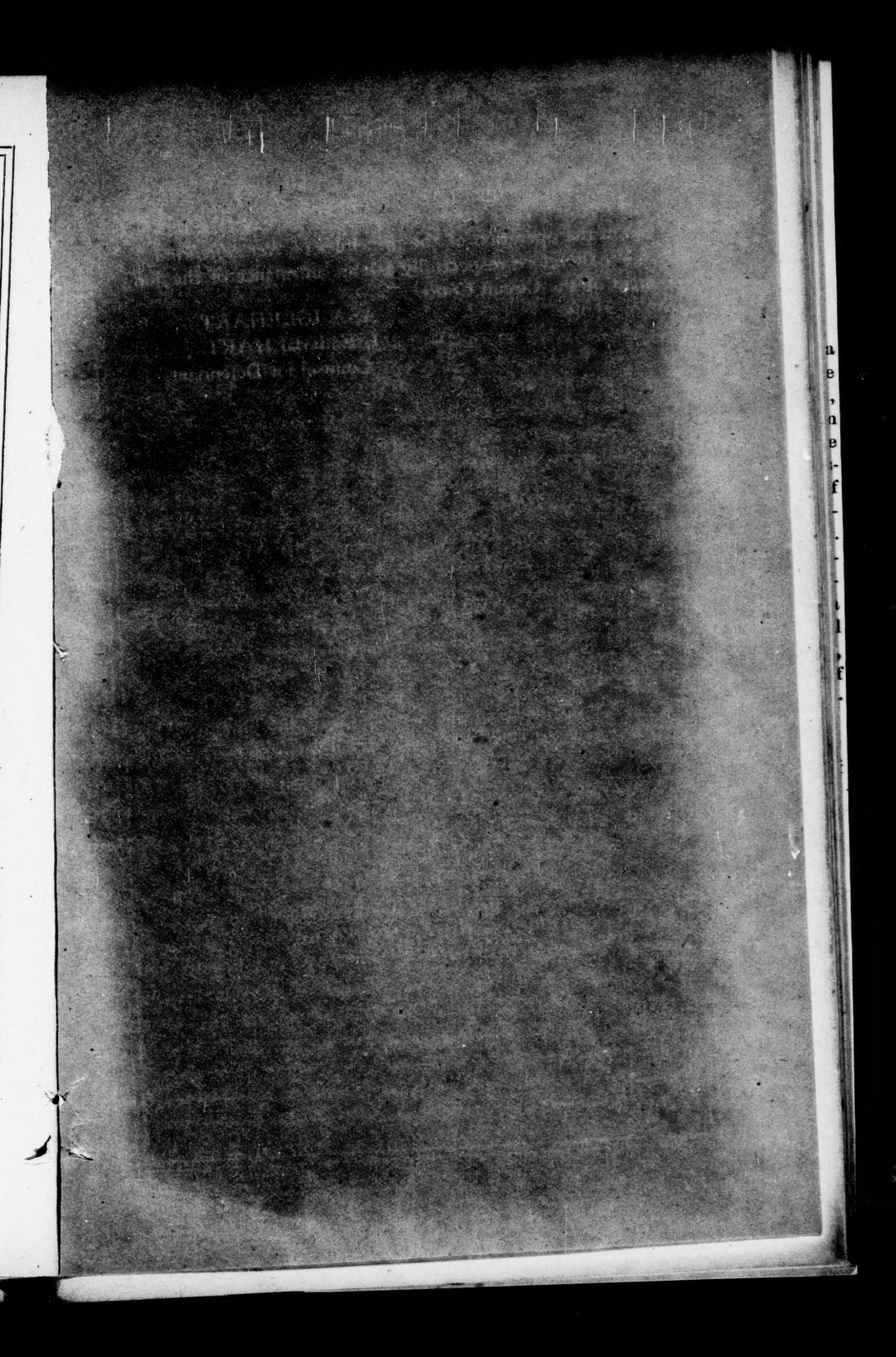
The point here is well illustrated by a case where application is made for a charter by the persons desiring it. In such a case no acceptance is necessary. Angell & Ames on Corporations, Sec. 93, and cases cited in notes.

We can not, perhaps, more appropriately close this argument than by quoting the language of Mr. Justice Swayne in Goodrich vs. the City: "Upon a careful examination of the complaint and the declaration, we are constrained to say that there is no such difference in the

cases which they respectively make as can take this case out of the operation of the principles of *Res adjudicata.*"

We therefore respectfully ask an affirmance of the judgment of the Circuit Court.

ASA IGLEHART,
J. E. IGLEHART,
Counsel for Defendant.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1875.

HENRIETTA S. GOULD, Ex., &c., Plaintiff in Error,
vs.
THE EVANSVILLE & CRAWFORDSVILLE RAILROAD COMPANY, Defendant in Error.
} No. 125.

Answer to Brief of Plaintiff in Error.

Having been compelled to prepare a brief for defendant in error before it was practicable to have inspection of [redacted] brief, we deem it proper to print a short answer to the various points made by learned counsel, and thereby, if possible, to present the controversy more pointedly and concisely than it was possible to do before hearing from the other side.

Answer to the first point:

1. We deny that the cases cited from 1 Blkf. and 6 Blkf. are inconsistent with the rule laid down in Gould on Pleading, and refer to pages 9 and 10 of our brief on file for demonstration of the denial.

2. The proposition that a judgment for the defendant upon demurrer to a declaration differs in its effect by way of estoppel from a judgment upon an issue of fact, is contradicted by Mr. Gould in our quotation on page 7

of our brief, as well as by this court in Goodrich vs. The City, Aurora vs. West, and Clearwater vs. Meredith, as also by the Supreme Courts of California and Alabama in *Robinson* vs. *Howard* and *Perkins* vs. *Moore*. Full reference to all these authorities is found on pages 7, 8, and 9 of our brief on file.

Answer to plaintiff's second point:

1. *Gilman* vs. *Rives* and *Wilbur* vs. *Gilmore*, like *Stephens* vs. *Dunbar* and Sperry vs. Forseman, are in consonance with the general rule, simply showing exceptions to it, and are sufficiently illustrated both by Gould on Pleading, quoted in our brief, and in the illustrations in the brief. Learned counsel simply *invert* the *order* by insisting that the *rule* is the *exception* and the *exception* the *rule*.

2. Mr. Herman's proposition may find support elsewhere, but it has none in this record. It is quite as easy to see the identity of the actions upon the same judgment in a code complaint and a declaration at law, as if the pleadings were both declarations at law. The similarity is certainly greater and the identity more apparent there than is the case where one litigation is upon a libel in admiralty and the other upon a declaration in an action on the case, as in Goodrich vs. The City.

3. But it is said that the judgment is but a judgment upon *non-suit* and *not* a *final judgment* upon demurrer.

Mr. Stephen, in his work on pleading, while discussing the form of final judgments for the defendant, and after pointing out the form where the demurrer is in abatement, or to a plea in abatement, proceeds (p. 107): But where issue (either of law or fact) arises upon the declaration or peremptory plea, the judgment for the defendant is "*that the plaintiff take nothing*, and that the defendant go thereof hence without day."

Thus we see that this is precisely the form of final judgment for the defendant, whether the issue be one of

law or fact, or whether the judgment be upon demurrer to the declaration or upon plea of general issue, or whether there be several steps of pleading and a trial by jury, and this every lawyer knows.

4. The cases in California and Alabama, say learned counsel, were founded entirely upon the *dictum* in Gould's Pleading. But this court, in *Aurora* vs. *West*, cited in our brief, quotes *Gould on Pleading*, and the California and Alabama cases are cited there also, so that the question is not an open one here.

Answer to the third, fourth, and fifth points:

1. Learned counsel simply assume the want of identity in the substantial allegations in the complaint and declaration, respectively. We have already discussed this question perhaps sufficiently. But learned counsel insist that the state court decided the case upon some technical point which does not go to the merits, and authority is cited (6 Ind. R., 46) to the point that *amalgamation or consolidation is dissolution.* And that because the complaint in the state court went upon the theory that the consolidation made both corporations parties to all suits, it is insisted that the court decided the case upon this technical point.

But a conclusive answer to all this is, first, the 27th section of the act of 1851 provides that the corporations *may consolidate*, and in such case shall have all the privileges granted to both companies, and *may "assume such name as the directors thereof may direct, and shall thereafter by such name be known."*—(Charter, p. 32, sec. 27.)

In the complaint in the state court, set out in the plea of the defendant in error, after alleging the rendition of the judgment and setting out a copy as an exhibit, follow these allegations: "And the plaintiff further avers that on the 18th of November, 1852, the said Evansville and Illinois Railroad Company, under and by virtue of the 27th section of an act of the General Assembly of the State of Indiana, entitled, &c., * * * approved Feb-

ruary 6, 1851, did consolidate her, the defendant's, organization and charter with the organization and charter of said Wabash Railroad Company, the same then and there being a corporation created by the laws of the State of Indiana, and the said Evansville and Illinois Railroad Company and said Wabash Railroad Company then and there and thereby became one company, and by said consolidation, and took the corporate name of '*The Evansville and Crawfordsville Railroad Company*,' took possession of all the rights, credits, effects, and property of said Evansville and Illinois Railroad Company and of said Wabash Railroad Company, and used and converted the same to her own use in said corporate name." * * (We refer to page 4 of our brief (*d*) for a complete summary of all these and other allegations of the complaint.)

We submit that under the allegations above set forth, which were admitted by the demurrer, the complaint was technically as strong as the declaration is here, and whether two entities were dissolved and the dissolved elements fused into one by consolidation, or whether they became united without dissolution, (a question purely speculative,) the terms of the consolidation act having been complied with, the consolidation was perfect, and the last act of the legislature mere supererogation. This was all the acceptance of the charter required.

But the very highest authority to which learned counsel refer (Prouty vs. Lake Shore, &c., Co., 53 N. Y., 263) repudiates the idea and refutes the proposition for which it is quoted, and sustains the sufficiency of the complaint in the state court.

The act provided for consolidation and assumption of name. The complainant averred both, and a conversion of the property of both corporations. All these allegations are admitted as true. If they do not show liability without the last act, liability cannot be shown by averment, and is not shown in the declaration here. The

last act of the legislature and its application have been already sufficiently discussed.

Answer to the sixth point:

This point is *more than technical.* But our answer is—

1. While it is true that under the Indiana Code, where a "*written instrument*" is the foundation of an action, the original or a copy must be filed with the complaint, it is also true that in Resor vs. Rainey, 14 Ind., 144, and Morris vs. Amos, 15 Ind., 365, as well as in the earlier cases cited by learned counsel, the supreme court held that a judgment was a *written instrument* within the meaning of the code. But it is equally true that in Lytle vs. Lytle, 37 Ind., 281, the whole of this line of rulings is expressly overruled, and it is now held that in pleading a judgment it is sufficient to set it out by its terms, and a copy need not be exhibited. Montgomery vs. Garrett, not involving this point, is no authority.

2. The rules of pleading in the federal courts do not require that we should have set out the record of the suit in the state court in *hæc verba.* We might have set it out in the same manner that the judgment was set out in the declaration, and averred the identity, and the question of identity would then have arisen upon the trial. But we preferred to raise the question upon demurrer, and so we set out all that was necessary for that purpose, and more than was necessary to be done to make the pleading good here, and averred that a copy not only of the *judgment* but of the *whole record* was exhibited in that suit as was then required. These allegations are admitted by the demurrer to the plea, and also by that demurrer-like replication. This pleading is a mere argumentative denial or demurrer, attempting to violate a simple elementary rule of pleading by denying what appears in the record and trying to raise an issue of fact where the same is not practicable. But this is a digression. We allege that the exhibit was filed. It is

twice admitted in the record, but denied in the brief for the first time, and we are coolly told that the state court sustained a demurrer to the complaint because the copy was *not* exhibited, when it is at the same time admitted twice in the record that the exhibit was filed. This objection answers itself.

Answer to seventh, eighth, ninth, and tenth points:

Nothing is contained in these points but a mere reiteration of what we have endeavored to answer. It is several times reiterated that a former judgment is no bar, unless the allegations in the two pleadings are *absolutely identical.* This is not necessary, as we have stated in our former brief; all that is necessary is that the causes of action are identical, and that the declaration in the case where the bar arises should have been so framed as to present the cause of action on its merits. In other words, in order to avoid the bar, where the causes of action are the same, the first declaration must have wanted some material allegation supplied in the second.

Goodrich vs. The City is a very notable illustration of this latter proposition. There was great disparity between the allegations of the declaration and the libel, upon which learned counsel there sought to avoid the bar upon this ground, but the court could not see such a differerence in the cases made by these two pleadings as to take the case out of the rule.

Learned counsel for the plaintiff in error set out by the statement that the record concedes that the money is justly due and unpaid, and closes by tacitly charging us with asking the court "to uphold an unconscionable defence and defeat an honest debt."

There are tribunals where such appeals are deemed legitimate by some, but we had not thought that this was one of them. But if the court shall think it in place we take the liberty of denying these assertions of learned counsel, and saying the record does not *concede* that the

money is *justly* due, *nor is it.* Nor is the defence an *unconscionable* one, nor is it interposed to defeat an *honest debt.* But this record shows the wisdom of the maxim, "*Interest reipublicæ ut sit finis litium,*" for despite the prevalence of this maxim the litigation of which this is one of the steps has been in progress for nearly a quarter of a century.

It is proper to say that the writer of our first brief did not have a copy of the record before him, which caused at least one grave misstatement as to its contents, but it is hardly deemed necessary, with so short a record, to refer to the particulars.

We earnestly, respectfully, and confidently ask an affirmance of the judgment below.

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